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UNITED STATES TAX COURT

ESTATE OF JAMES O. TOMERLIN, WILLIAM R. TOMERLIN, EXECUTOR, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 704-83. Filed April 15, 1986.

In August 1975, decedent was a 50-percent stockholder in a corporation that purchased a life insurance policy on decedent's life. The corporation owned the policy, paid the premiums and named itself and decedent's children as beneficiaries. In October 1975, the corporation and decedent entered into an agreement whereby decedent was given certain rights with respect to the insurance policy. Held, the proceeds of the insurance policy payable to decedent's children are includable in decedent's gross estate pursuant to sec. 2042(2), I.R.C. 1954, because decedent possessed incidents of ownership in the insurance policy at the time of his death.

Douglas M. Edwards, for the petitioner.

A. Chris Zimmerman, for the respondent.

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MEMORANDUM OPINION

STERRETT, Chief Judge: By notice of deficiency dated October 6, 1982, respondent determined a deficiency of $138,346 in the Federal estate tax of the Estate of James O. Tomerlin. After concessions, the sole issue for our resolution is whether decedent possessed any incidents of ownership in a life insurance policy on decedent's life, thereby warranting the inclusion of the proceeds of said policy in decedent's gross estate pursuant to section 2042(2).[1]

The facts have been fully stipulated pursuant to Rule 122 and are so found. The stipulation of facts, together with the exhibits attached thereto, is incorporated herein by this reference and form the basis of the Court's findings of fact.

Petitioner herein is the Estate of James O. Tomerlin. James O. Tomerlin (hereinafter referred to as decedent) died on November 10, 1978 at the age of 57. William R. Tomerlin is the executor of decedent's estate, and he resided in Gardnerville, Nevada at the time the petition was filed in the instant case. Decedent's Federal estate tax return was timely filed with the Office of the Internal Revenue Service at Reno, Nevada.

At all relevant times, decedent and his brother, William R. Tomerlin, each owned 50 percent of the stock of Cyclo Automotive, Inc., a Nevada corporation (hereinafter referred to as Cyclo).

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[1] Unless otherwise stated, all section references are to the Internal Revenue Code of 1954, as amended and in effect during the taxable year in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

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In August 1975, New York Life Insurance Company issued an insurance policy in the face amount of $200,000 on the life of decedent with Cyclo designated as owner. The beneficiaries under the insurance policy were Cyclo and decedent's children. The insurance policy provided that upon decedent's death Cyclo would be entitled to receive an amount equal to the insurance policy premiums it had paid, and that the remaining insurance proceeds, if any, would be paid to decedent's children.

Under the terms of the insurance policy, Cyclo, not decedent, was given all of the incidents of ownership. However, pursuant to an agreement entered into between decedent and Cyclo in October of 1975, decedent was given certain rights with respect to the insurance policy. The relevant provisions of the agreement provided as follows:

> 4. [Decedent] * * * shall be entitled, during the existence of this agreement, to specify in writing the beneficiary or beneficiaries which * * * [Cyclo] shall designate to receive any death benefit proceeds payable under said [insurance] policy * * *. * * * [Cyclo] will not change such designation of beneficiary except with the written consent of * * * [decedent].
>
> 5. While this agreement is in force, * * * [Cyclo] agrees that it will not surrender, sell, transfer or otherwise terminate its interest in said policy without the written consent of * * * [decedent]. * * *
>
> 6. This agreement shall terminate on the occurrence of any of the following events:
> (a) Either party may terminate this agreement by giving written notice to the other party, sent by Registered Mail;
> (b) The mutual consent of both parties;
> (c) Termination of employment of * * * [decedent] during his lifetime.

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> 7. Upon the termination of this agreement, * * * [decedent] may * * * purchase said [insurance] policy from * * * [Cyclo] by paying to * * * [Cyclo] a purchase price equal to said [insurance] policy's tabular cash value at the date of sale, less any existing indebtedness charged against said [insurance] policy. Upon payment of such amount, * * * [Cyclo] will transfer ownership of said [insurance] policy to * * * [decedent] and * * * [Cyclo] shall have no further rights therein. * * *

In his Federal estate tax return, decedent's gross estate did not include the life insurance proceeds of $183,588 payable to decedent's children. In the statutory notice of deficiency, respondent determined that such proceeds are includable in decedent's gross estate pursuant to section 2042(2).

Section 2042(2) requires the proceeds of life insurance on a decedent's life to be included in his gross estate if he possessed at the time of his death any incidents of ownership in the policy, exercisable either alone or in conjunction with another person. While the statute does not define the term "incidents of ownership," section 20.2042-1(c)(2), Estate Tax Regs., does elaborate on its meaning and provides in part as follows:

> the term "incidents of ownership" is not limited in its meaning to ownership of the policy in the technical legal sense. Generally speaking, the term has reference to the right of the insured or his estate to the economic benefits of the policy. Thus, it includes the power to change the beneficiary, to surrender or cancel the policy, to assign the policy, to revoke an assignment, to pledge the policy for a loan, or to obtain from the

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> insurer a loan against the surrender value of the policy, etc. * * *[2]

As used in this regulation, the word "power" refers to a legal power to exercise an incident of ownership. See Commissioner v. Estate of Noel, 380 U.S. 678, 684 (1965); Estate of Bartlett v. Commissioner, 54 T.C. 1590, 1597-1598 (1970).

We must determine whether decedent at the time of his death possessed any incidents of ownership in the life insurance policy to cause the inclusion of the policy's proceeds in his gross estate. Petitioner contends that decedent, under the terms of the insurance policy, did not possess any incidents of ownership. Respondent maintains that, by virtue of the agreement entered into between decedent and Cyclo, decedent did possess incidents of ownership at the time of his death within the meaning of section 2042(2). We agree with respondent.

We faced this issue in Estate of Thompson v. Commissioner, T.C. Memo. 1981-200. In Estate of Thompson, decedent's wholly owned corporation purchased a life insurance policy on decedent's life in 1973. The corporation owned the policy, paid the premiums and named itself as beneficiary. The policy provided

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[2] See also Nance v. United States, 430 F.2d 662, 663 (9th Cir. 1970) (decedent's right to change the beneficiary of the insurance policy, subject to the beneficiary's consent, is an incident of ownership); Commissioner v. Estate of Karagheusian 233 F.2d 197, 199-200 (2d Cir. 1956) (decedent, acting in conjunction with his wife and daughter, had the power to determine the ultimate distribution of the proceeds of the insurance policy and this power was an incident of ownership); Schwager v. Commissioner, 64 T.C. 781, 789-792 (1975) (decedent's negative power, the right to veto a change in the beneficiaries of the insurance policy, was an incident of ownership).

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that all rights available under the policy were vested in the owner (the corporation) and were exercisable without the consent of anyone else. In 1975, the corporation and decedent entered into a contract whereby decedent obtained the legal power, in conjunction with the corporation, to change the beneficiary of the proceeds of the policy. Respondent determined that the proceeds of the policy should be included in decedent's gross estate pursuant to section 2042(2). His determination was based on the fact that decedent had been given certain incidents of ownership in the policy by virtue of the agreement entered into between decedent and the corporation. We agreed with respondent. In reaching our result, we did not limit our analysis to the provisions of the insurance policy. Rather, we examined the contract between decedent and the corporation and determined that, by virtue of such contract, decedent at the time of his death possessed incidents of ownership in the insurance policy.[3]

In the instant case, like the situation in Estate of Thompson v. Commissioner, supra, decedent possessed incidents of ownership in the insurance policy by virtue of the contract

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[3] See also Estate of Fruehauf v. Commissioner, 427 F.2d 80 (6th Cir. 1970), affg. 50 T.C. 915 (1968)(where the fact that decedent possessed incidents of ownership in the life insurance policy was determined from an examination of the provisions of a will); Commissioner v. Estate of Karagheusian, supra (decedent's incidents of ownership in the life insurance policy were created by a collateral contract, which was a trust instrument).

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entered into between decedent and Cyclo.[4] Decedent was given the right to designate the beneficiaries of the insurance policy, the right to veto a change of beneficiaries, the right to veto an assignment of the insurance policy, and the right to cancel and then purchase the insurance policy at its cash value. These rights clearly are incidents of ownership which warrant the inclusion in decedent's gross estate of the policy's proceeds payable to his children. Sec. 20.2042-1(c)(2), Estate Tax Regs.

To reflect the foregoing,

Decision will be entered under Rule 155.

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[4] Since both parties apparently proceeded on the assumption that the contract was valid and binding upon decedent and Cyclo, we also proceed on this assumption.

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T. C. Memo. 1986-148

UNITED STATES TAX COURT

THOMAS J. SUNDERLIN, Petitioner v.
COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 29579-83. Filed April 15, 1986.

Thomas J. Sunderlin, pro se.

Jerome F. Warner, and Edward D. Fickess, for the respondent.

MEMORANDUM OPINION

CLAPP, Judge: This case is before the Court on respondent's Motion for Summary Judgment pursuant to Rule 121.[1]

[1] Unless otherwise indicated, all references to Rules are to the Tax Court Rules of Practice and Procedure. All section references are to the Internal Revenue Code of 1954, as amended.

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Respondent determined deficiencies and additions to tax in petitioner's Federal income tax as follows:

Year	Deficiency	Additions to Tax Sec. 6653(b)	Additions to Tax Sec. 6654
1980	$6,257.93	$3,128.97	$ 207.09
1981	3,308.00	1,654.00	242.54

Petitioner timely filed a petition with this Court in which it was alleged that "this is a case of Malicious prosecution which has been going on since 1975 with the Notice of Deficiency for the years of 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 19798, [sic] and now 1980 and 1981 being used as an aggravated Harrassment against the petitioners." In addition, petitioner alleged that the assessment agent had no lawful jurisdiction over petitioner and that the assessment agent lied and committed fraud when he stated that petitioner did not file a tax return. Petitioner also made allegations as to the unconstitutionality of the Tax Court and that he has been denied due process and a right to trial by jury.

Respondent filed his answer on March 22, 1984 wherein he recited affirmative allegations in support of his determinations under section 6653(b). Petitioner failed to file a reply. On June 14, 1984, respondent filed a Motion For Entry of Order That Undenied Allegations In The Answer Be Deemed Admitted. The petitioner informally alleged that he never received a copy of respondent's answer or motion. On July 16, 1984, the Court extended the time within which the petitioner could file a reply to August 30, 1984. On September 4, 1984 petitioner filed his

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reply. Petitioner has asserted errors respecting exemptions, deductions and dependents, but has failed to allege justiciable facts in support of the allegations of error. The reply stated "There is no way in this world that he could possibly owe this tax with 11 dependents * * *" and "Petitioner denies that he was only entitled to 4 exemptions * * *."[2] On September 12, 1984 respondent filed the motion before us. On October 9, 1984 petitioner filed a "Notice of Objection of Motion For Summary Judgment." The notice states that "there are genuine issues" and "These issues, especially of Fraud can be sustained by substantial evidence which petitioner shall submit for jury trial." Petitioner has failed to produce any evidence to support his allegations. Thus, we find petitioner's assertions to be frivolous.[3]

The affirmative allegations deemed admitted and the record as a whole establish the following facts:

Petitioner resided in Utica, New York at the time he filed his petition in this case.

Petitioner received $26,662.62 and $19,617.32 as wages from Joseph Lawrence, Inc. in 1980 and 1981, respectively. He did not file a 1980 Federal income tax return. On May 12, 1980, he filed a form which purported to be a 1979 Federal income tax return.

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[2] The affirmative allegations not expressly admitted or denied are deemed admitted. Rule 37(c). We also note that petitioner claimed only 4 personal exemptions on the form purporting to be his 1981 return.

[3] See Miller v. Commissioner, T.C. Memo. 1983-476; Rules 34(b)(4) and (b)(5), 37 (b) and 121(d).

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On April 15, 1982, he filed a similar form which purported to be a 1981 return. The forms did not contain any information relating to his income tax liability. The lines on the forms only contained either the notation "Fifth Amendment" or zeroes. Petitioner filed W-4 Forms with his employer on April 3, 1978, January 3, 1979, December 19, 1979, and February 6, 1982 in which he claimed to be exempt from income taxes. His filing of such forms resulted in only $2,408.76 and $114.30 being withheld from his wages in 1980 and 1981, respectively.

Petitioner failed to make available to respondent the records necessary for the determination of his income tax liability. Respondent determined petitioner's taxable income for 1980 and 1981 using the specific items method of proof. Petitioner was entitled to four exemptions. Petitioner's adjusted gross income was $26,662.62 and $19,617.32 for 1980 and 1981, respectively. He owed taxes in the amount of $6,257.93 and $3,308.00 for 1980 and 1981, respectively.

Rule 121(b) provides that a motion for summary judgment shall be granted if the pleadings, answers to interrogatories, depositions, admissions, and any other acceptable materials, together with affidavits, if any, show that there is no genuine issue as to any material fact and that a decision may be rendered

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as a matter of law. In the present case, no genuine issue as to any material fact exists,[4] and as discussed below, a decision may be rendered as a matter of law.

The record clearly establishes that the deficiencies and section 6654 additions to tax are due.

The burden of proof with respect to the fraud issue is upon respondent to prove, by clear and convincing evidence, that there was an underpayment of tax some part of which was due to fraud with an intent to evade tax. Rule 142(a); Imburgia v. Commissioner, 22 T.C. 1002 (1954). This burden is met if it is shown that the taxpayer intended to evade taxes known to be owing by conduct intended to conceal, mislead or otherwise prevent collection of such taxes. Stoltzfus v. United States, 398 F.2d 1002, 1004 (3d Cir. 1968); Webb v. Commissioner, 394 F.2d 366 (5th Cir. 1968), affg. a Memorandum Opinion of this Court.

The existence of fraud is a question of fact to be resolved upon consideration of the entire record. Gajewski v. Commissioner, 67 T.C. 181, 199 (1976), affd. without published opinion 578 F.2d 1383 (8th Cir. 1978). Fraud may be proved by circumstantial evidence because direct proof of the taxpayer's intent is rarely available. The taxpayer's entire course of conduct may establish the requisite fraudulent intent. Stone v. Commissioner, 56 T.C. 213, 223-224 (1971).

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[4] See Mallory v. Commissioner, T.C. Memo. 1983-257; Rules 34(b)(4) and (b)(5), 37(b) and 121(d).

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In the present case, petitioner failed to file a 1980 or 1981 Federal income tax return. His purported 1981 return containing the notation "Fifth Amendment" and zeroes does not constitute a return for purposes of the Internal Revenue Code. See Reiff v. Commissioner, 77 T.C. 1169, 1176-1179 (1981), and the cases cited therein. He submitted "protester" documents purporting to be Federal income tax returns. He filed W-4 forms which clearly were false; the filing of such forms resulted in a minimal amount of wages being withheld during the years in issue. He failed to provide respondent with the necessary information to determine his tax liability. These facts and the record as a whole clearly and convincingly establish that the underpayments of tax were due to fraud with intent to evade taxes.[5] Respondent's additions to tax for fraud are sustained.

Petitioner's pleadings have raised a number of frivolous contentions which we now answer. The imposition of the burden of proof on petitioner is constitutional. Welch v. Helvering, supra. It is well settled that in a suit concerning Federal tax liability, no right to a jury trial exists. Cupp v. Commissioner, 65 T.C. 68, 86 (1975), affd. without published opinion 559 F.2d 1207 (3d Cir. 1977). The Federal income tax laws do not violate petitioner's First Amendment rights. Muste v. Commissioner, 35 T.C. 913 (1961). Petitioner's Fifth Amendment rights pertaining to due process and self-incrimination

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[5] See Ammen v. Commissioner, T.C. Memo. 1982-476.

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have not been violated. Wilkinson v. Commissioner, 71 T.C. 633, 637-639 (1979). We have considered petitioner's other contentions. They likewise are frivolous. See Rowlee v. Commissioner, 80 T.C. 1111, 1114-1123 (1983).

Accordingly, respondent's Motion for Summary Judgment is granted. To reflect the foregoing,

An appropriate order will be entered.

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